REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

ELC NO. 782 OF 2017

RICHARD KARIUKI KAMWENJI…… PLAINTIFF

VERSUS

ELIZABETH NGINA KARIUKI (as the administratix of the estate

of the late ZAKARIA KIMUHU)…… DEFENDANT

RULING

1) This matter has a history dating back to 1980 when it was first filed in the High Court as **Civil Suit 1200 of 1980**. Finally, the matter was heard and parties were directed to file written submissions and a mention date reserved to pick a Judgment date.
2) Before the mention, the Plaintiff filed another application vide the Notice of Motion Application dated 16/01/2026 seeking leave to allow the Plaintiff re-open his case so as to produce the Sale Agreement dated 8/04/1980. The Sale Agreement was between Zakaria Kimuhu (deceased) and the Plaintiff. The said Sale Agreement the Applicant alleges was

listed as document number **‘7’** in the List of Documents dated 23/08/2019 but it was not filed and produced.

3) The application is opposed vide a Replying Affidavit sworn by the Defendant dated 26/01/2026. The gist of opposing the application is that it is coming too late in the day. That it is 4 months after parties closed their respective cases and is therefore a gap filling strategy.
4) In opposing the application, the Respondent highlighted the journey of the cases since 1980 culminating to having this matter transferred to the Environment and Land Court in 2017. By then the consent Judgment that had been entered between Zakaria Kimuhu and the Applicant in 1980 was set aside in 1983 including the Decree, Judgment and all transfers.
5) Due to the age of the case, it is the contention of the Defendant that allowing the application would be prejudicial since memories have faded, people have died and records have been lost, misplaced and erased.
6) The parties were directed to file written submissions and exchange within five days from 22/01/2026. At the time of writing this Ruling today 26/01/2026 none of the parties had filed any submissions. Therefore, my Ruling is devoid of the written submissions of both the Applicant and the Defendant.

Analysis and Determination

7) The Application is anchored on **Sections 1A and 1B** of the Civil Procedure Act, which mandate the Court to ensure the just, expeditious, proportionate, and affordable resolution of disputes. However, as Court, I must also consider **Section 3A** which addresses the issue of inherent power to prevent an abuse of the Court process.

8) I have considered the Notice of Motion, the Affidavit in support and the response thereto. The issues for determination are:

   i. *Whether the application dated 16/01/2026 to reopen the Plaintiff's case and produce the Sale Agreement dated 8/04/1980 is merited;*

   ii. *Who should bear the costs of this application?*

9) The power to re-open a case is discretionary but must be exercised with the greatest of care. It is common practice that Courts have discretion to reopen cases but while the principle of a fair trial is a Constitutional right under Article 50 of the Constitution, this discretion must be exercised judiciously and in a manner that upholds the integrity of the judicial process.

10) Courts have held that for a case to be reopened, the Applicant must show that there has been new evidence which could not be obtained earlier and that the evidence is crucial to the case determination. It is also imperative that reopening would not be prejudicial to any party; that

reopening is not intended to fill evidential gaps; and the application has not been made inordinately late see **Susan Wavinya Mutavi v Isaac Njoroge & Another [2020] eKLR** as held by Eboso J. The rule of thumb is that the Court must be satisfied that re-opening the case is necessary to ensure that justice is done.

11) Therefore, an application to reopen a case to introduce new evidence after the close of a hearing but before Judgment is a matter of judicial discretion, and is subject to strict legal tests.

12) The Courts have adopted the principles established from **Ladd v Marshall [1954] 1 WLR 1489**, where if fresh evidence should be admitted after a trial the Applicant must satisfy three main conditions:

i. **Reasonable Diligence: It must be shown that the evidence could not have been obtained with reasonable diligence for use during the actual trial.**
ii. **Impact on Result: The evidence must be such that, if given, it would probably have an important influence on the result of the case.**
iii. **Credibility: The evidence must be apparently credible, although it does not need to be incontrovertible.**

13) In the case of **Paan v Kariuki & 16 Others [2024] eKLR;** The Court held that a case should not be reopened if the application is made inordinately late or if the information was accessible and could have been obtained earlier through reasonable inquiry. Further in the above referenced case of **Susan Wavinya Mutavi v Isaac Njoroge & Another [supra]** established that reopening of a case is not permitted to fill evidential gaps or when the delay is unexplained.

14) The Court in yet another case of **Samuel Kiti Lewa v Housing Finance Company Limited & Another [2015] eKLR;** emphasized that while it has discretion to reopen, it must not do so if it causes "embarrassment or prejudice" to the other party.

15) On the part of the Court of Appeal in **Gachuki & Another v Njenga & 2 Others [2025] KECA 451;** Court reiterated that additional evidence must not be utilized for removing lacunae and filling gaps in evidence.

16) The Applicant claims that the Sale Agreement is a crucial document in the proceedings as it demonstrates that the Plaintiff/Applicant purchased 2 acres of the land LR NDUMBERI/NDUMBERI/738 from the late Zakaria Kimuhu. That it will aid the Court in arriving at justice as it supports the documents of Transfer of Shares in LR

NDUMBERI/NDUMBERI/738 which is already produced by the Plaintiff/Applicant as an exhibit.

17) The central issue for determination is whether the purported evidence qualifies as new evidence that could not have been procured earlier with due diligence and whether it meets the threshold for re-opening of cases. The Court must assess if the circumstances warrant the exceptional step of re-opening the case to admit additional testimony.

18) I find that the Plaintiff's Sale Agreement does not constitute new evidence. This information was accessible and could have been obtained earlier and produced for Court's scrutiny. As the Defendant has stated in her Replying Affidavit at paragraph 5;

> ***"The Plaintiff herein sued the late Zacharia Kimuhu forty-six (46) years ago in Nairobi HCCC No. 1200 of 1980. The Plaintiff obtained a consent Judgment, which was set aside in 1983 upon the application of Zacharia's widow and administrator of his estate. The Court held that the consent Judgment was irregular because Zacharia was a stranger to the proceedings. It then set aside the Decree, Judgment and all consequential transfers and registrations, ejusdem generis."***

19) Consequently, the proposed re-opening of the case to produce a Sale Agreement would offer no fresh insights or material facts that have not been already scrutinized and addressed during PW1's testimony given the fact the documents of transfer were set aside.

20) Additionally, a document dated 1980 has existed for over 45 years. Failing to produce it during the eight-year period the suit was pending (2017–2025) strongly suggests a lack of due diligence. There must be finality of litigation and reopening a case just before Judgment undermines the principle that litigation must have an end as is aptly captured in the Latin maxim ***interest reipublicae ut sit finis litium***. Meaning that it is in the interest of the state that there be an end to litigation, emphasizing that legal disputes must have finality for public order, justice, and efficiency, preventing endless legal battles and encouraging timely resolution.

21) Allowing one party to introduce a critical Sale Agreement after the other party has already closed their case and cannot cross-examine or rebut the new facts is highly prejudicial.

22) In the South African case of **Mkwanazi v Van der Merwe [1970],** the Court held that once a case is closed, it will only be reopened if the evidence is material and the failure to produce it earlier is satisfactorily explained.

23) The Applicant admits that the document was in his List of Documents in 2019. This is a fatal admission. It proves the document was in the Applicant's possession for at least 7 years before the case closed. There is no explanation as to why it was not produced during the Plaintiff's testimony.

24) This matter began in 1980. The Respondent rightly points out that the 1980 Consent was set aside in 1983. For 43 years, the status of this land has been in limbo. To re-open a case of this age at the 11th hour to introduce a document that was available throughout the trial would be to reward indolence and cause litigation without end.

25) The Respondent is at a severe disadvantage. In a 46-year-old case, the Defendant cannot be expected to cross-examine a witness on a new 1980 document when the primary signatory (Zakaria Kimuhu) is deceased. This is the definition of irreparable prejudice.

26) This Application from my view is a classic case of gap-filling after the Plaintiff realized the evidentiary deficit in their case during the preparation of submissions.

27) Finality in litigation is a matter of public policy. The doors of Justice are open, but they are not revolving doors.

28) In light of these considerations, I find that the application to re-open the case lacks merit and is hereby dismissed. Costs of this application shall be in the cause.

29) I do grant the parties five (5) additional days from the thirty (30) days earlier granted on 6/10/2025 to file and exchange written submissions to the concluded and closed case. Judgment shall be delivered on **11/06/2026.**

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 2ND DAY OF FEBRUARY, 2026.

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MOGENI J

JUDGE

In the presence of:-

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Mr. Melita – Court Assistant

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MOGENI J

JUDGE